

**Garay & Co., Inc. and Local 3128, Production and Service Employees Union, United Brotherhood of Carpenters & Joiners of America, AFL-CIO.**  
Case 2-CA-17302

April 29, 1982

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On October 19, 1981, Administrative Law Judge Arthur A. Herman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

<sup>1</sup> The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

**DECISION**

**STATEMENT OF THE CASE**

ARTHUR A. HERMAN, Administrative Law Judge: This case was heard before me on March 23, 24, and 25, 1981, at New York, New York. The charge was filed on June 11, 1980,<sup>1</sup> and amended on June 30, by Local 3128, Production and Service Employees Union, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, herein called the Union. The complaint issued on August 8, alleging that Garay & Co., Inc., herein called Respondent or Company, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. More particularly, the complaint alleges that Respondent violated the Act in the following manner: Section

<sup>1</sup> Unless otherwise stated, all dates herein occurred in 1980.

8(a)(1), by interrogation of, threats to, employees regarding their union activities; Section 8(a)(3), by granting wage increases to discourage employees from engaging in union activities, by discriminatorily laying off employee Jean Thomas,<sup>2</sup> and by discharging employees Jeanine Casale, John McGlyn, Donna Mitchell, Linda McLean, Michele Parsons, and Raya Davidovich because of their union activities and failing and refusing to reinstate them; and Section 8(a)(5) by committing the above-described violations and failing and refusing to recognize the Union as the representative of Respondent's employees following the Union's demand for recognition at a time when the Union represented a majority of Respondent's employees, thereby creating a coercive atmosphere which has rendered the holding of a fair election impossible.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent is a New York corporation engaged in the manufacture, sale, and distribution of belts at its plant located in New York City. During the past year, Respondent sold and shipped goods valued in excess of \$50,000 directly to customers located outside the State of New York. The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. LABOR ORGANIZATION**

I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**III. THE APPROPRIATE UNIT**

Respondent admits, and I find, that all of Respondent's office clerical employees, employed by at its facilities at 33rd Street, and at 14 Street, New York, New York, exclusive of all other employees and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

**IV. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. The Setting**

As stated above, Respondent is engaged in the manufacture, sale, and distribution of belts. Prior to June 1980, it was engaged also in the importation, sale, and distribu-

<sup>2</sup> The General Counsel presented no evidence to support this allegation. Rather, on examination by Respondent, Thomas clearly stated that after she approached Respondent and requested a week's vacation, Respondent asked her to take it as a layoff in light of the Company's financial problems, and she agreed. Under the circumstances, the General Counsel moved to withdraw the allegation, and added that it had no objection if I chose to dismiss it. Accordingly, I granted Respondent's motion to dismiss this allegation.

tion of handbags which it purchased from the Orient. During the year 1979, and up to approximately June 1980, the Company occupied space in two buildings in New York City. The 33rd Street facility contained a showroom and office which housed most of the clerical employees involved herein. On 14th Street the Company occupied two floors, each of which measured 26,000 square feet. About one-fifth of one floor was used for the manufacture of belts, and the balance was used for the warehousing of handbags. The other floor was devoted to the receipt of belt materials, and the manufacture, storage, and shipment of belts. It also included the factory management offices, a few clerical employees, and the design functions. In 1979, the Company processed 84,148 invoices with sales totaling \$11,029,127.

Sometime in February or early March, Stephen Golub was hired to be controller of the Company. He was interviewed by a member of Respondent's board of directors, and was told that the Company was in financial trouble. The former president and controller had been dismissed, the Company was out of cash, and the records were in a state of total confusion.<sup>3</sup> On assuming his position on March 17, Golub was immediately deluged with telephone calls from creditors demanding payment of past due debts. Within the next few weeks, Golub was able to appraise the situation. He found out that the Company had two computers, one which was not used at all and another which was not operating correctly because it was improperly programmed; in addition, the Company did not know its inventory position; there were no summaries of what was being produced and sold; the Company owed the bank about \$500,000; cash in the bank was virtually zero; accounts payable were around \$900,000; although the accounts receivable ledger shown to Golub indicated \$1 million due the Company, the records were so confusing, it was very difficult to determine just what the receivables were at that time; and the handbag operation was in the process of being discontinued.<sup>4</sup> In addition, belt sales were dropping. However, Golub was advised by the sales force that with the coming of the first market week in May,<sup>5</sup> sales of belts would improve. This did not prove correct. The day before the May market week commenced, a significant portion of the Company's sales force left the Company, thereby leaving the Company unrepresented in a

large portion of the country. Still, the salesmen promised an increase in sales during the June market week, but this too did not materialize. Moreover, rumors started that the Company was going out of business, so that buyers did not place orders during market week for fear that they would not get deliveries. The Company's records show that for the second quarter of the year, sales were down from \$2,135,118 in 1979 to \$840,537 in 1980, bookings were down from \$4,439,516 in 1979 to \$903,515 in 1980, and the number of invoices processed were down from 29,400 in 1979 to 2,922 in 1980.<sup>6</sup>

#### B. The Alleged Unfair Labor Practices

Faced with this condition, Golub testified that he had to resort to various means to stem the tide of disaster, and that it took him from April to June to accomplish it. His first order of business was to schedule out accounts payable, and then get involved in order processing. The computer was used for whatever little help it could offer. The idle computer was sold in April in order to raise some cash. With the discontinuance of the handbag operation, Golub realized that a consolidation of the Company's two facilities would be more advantageous both financially and for better coordination. And so, in early May it was decided to close down 33d Street, move the showroom to a better location on 5th Avenue, and locate the clerical staff on 14th Street. Sometime around June 15, Golub informed the clerical employees about the impending move, and the actual move occurred in the beginning of July. In addition, in June, Golub entered into an arrangement with Dunn and Bradstreet whereby the latter would do the collection work for the Company.

Concomitant with these various business moves was the all important question of personnel. When Golub began working for the Company in March, the Company employed either 19 or 20 clerical employees;<sup>7</sup> the 33d Street office consisted of 2 accounts payable clerks, 2 accounts receivable clerks, 3 credit and collection clerks who logged in the orders and contacted customers for payment,<sup>8</sup> 2 order processing clerks who coded the orders for input into the computer, 3 keypunch operators who fed the orders and shipments into the computer, 1 payroll clerk, 1 data processing clerk who made sure the right information went into the computer, 1 messenger, and 1 receptionist; at 14th Street, the Company employed 1 purchasing clerk and 1 assistant and 1 file clerk and 1 assistant in purchasing and inventory. Also, at 14th Street, the Company employed approximately 80 production and maintenance employees who were represented

<sup>3</sup> Golub was called to testify by the General Counsel, and the latter was permitted to question the witness pursuant to Rule 611(c) of the Federal Rules of Evidence. Inasmuch as no evidence was offered by the General Counsel or the Charging Party's counsel to refute the factual analysis presented by the witness, and since Golub impressed me as a frank and honest witness with a great ability to relate succinctly the events of 1980, I credit his testimony.

<sup>4</sup> According to Golub, the handbag operation was extremely unsuccessful. It required a tremendous cash outlay. Shipments from the Orient were made under letters of credit which were exercised when the handbags arrived in the U.S. and automatically the bank drew a note payable in 120 days. Thus, paying in advance for merchandise created a cash flow problem. The Company therefore decided to discontinue the handbag operation before Golub came on the scene, and the sale of the handbag inventory continued until it was completely liquidated in June.

<sup>5</sup> It seems that the industry has two "market weeks" at which time buyers come to the showrooms and place their orders for the coming season. The first market week takes place during the first 2 weeks in May, and the second market week is held during the first 2 weeks in June.

<sup>6</sup> Testimony by several of the clerical employees confirmed Golub's figures regarding the poor financial condition of the Company.

<sup>7</sup> The parties stipulated to the names and titles of these individuals as being employees of the Company from June 1 to June 27. (Jt. Exh. 1.) The General Counsel contends and Respondent denies that Alice Esteves, listed on the exhibit as "Accounts Payable, Payroll, insurance," is the office manager, and therefore a supervisor of Respondent. Her duties shall be discussed, *infra*.

<sup>8</sup> One credit and collections clerk (Lipnick) was terminated by Golub in April, and, about the same time, Golub hired O'Hagen, an accounts payable clerk because accounts payable had been taken off the computer and Golub needed someone with O'Hagen's ability to handle the manual accounts payable functions.

by Local 40, International Ladies' Garment Workers' Union.<sup>9</sup>

On April 17, Golub discharged the office manager, Phoebe Chu, and assumed the responsibility of supervising all of the office clerical employees. He testified that he "had no one else on the staff who [he] was aware of who could fulfill those duties, and one of the things [he] hoped to learn by talking to and being with these people a little bit more was to find out who the most valuable members of [his] staff were." Golub further testified that within minutes of his discharge of Chu, which occurred in late afternoon, he saw other clerical employees extremely upset over the discharge and preparing to leave, never to return. Golub held an impromptu meeting with these employees and found out that they were discontent on two counts: First, because of their fondness for Chu, and secondly, they were upset with the way things were going with the Company—the president and former controller had been discharged; they felt very insecure about the future of the Company; they had been given promises by the president, controller, and Chu that pay rates would be increased, and now with Chu gone they doubted if they were going to get wage increases. Golub testified that he assured them that now he would get to know them better and that as soon as possible he would review the salary structure, and that the Company would honor those promises to the extent that it could.<sup>10</sup>

According to Golub, he worked with the clerical employees for about a month following Chu's discharge, and became well aware of who was most competent and what their skills were. Whereupon, on Saturday, May 24,<sup>11</sup> after receiving notice from one of his showroom personnel on May 23 that she was leaving the employ of the Company 2 weeks later,<sup>12</sup> and despite the deteriorating financial position of the Company, Golub reviewed the personnel records of all of the clerical employees, the sales people and factory management, with a view to seeing what kind of increases could be given with the money saved by the individual leaving. In all, Golub reviewed 29 employees' personnel records and concluded, on May 24, that he would give wage increases ranging from \$15 to \$20 to each of 12 employees selected,<sup>13</sup> by dividing up the earnings of the person who was leaving.<sup>14</sup> The announcement of these raises, and their effective date, occurred simultaneously on June 6 and coincided with the last day of employment of the showroom employee.

With this as background, we come now to the organizational activities of the Union *vis-a-vis* the Company. Jeanine Casale, a credit and collections clerk for the Company, and a daughter of the president of the Union, testified that she approached her father sometime in April, and requested that he assist her in organizing the

Company's office clerical employees. The record establishes that June 2 was the earliest date that any of the Union's authorization cards were signed; that as of June 5, nine employees had signed cards for the Union; that on June 9, one more card was signed, on June 26 an additional card was signed, and on June 27, two more were added.<sup>15</sup> As stated above in footnote 7, in dispute is the supervisory status of Esteves. Esteves was employed on a full-time basis sometime in 1978, doing accounts payable and keeping records of insurance, disability, and absenteeism for payroll purposes. After Chu was discharged, Esteves' duties increased to the extent that she now ordered supplies, kept attendance, trained other employees, and upon instruction from Golub, assigned work to employees named by Golub. Esteves credibly testified, without refutation, that she had none of the supervisory indicia contained in Section 2(11) of the Act, and Casale, on cross-examination, admitted that she stated in her affidavit to the Board agent, that Golub was her immediate supervisor and he was the person who gave orders to the office clerical employees. In find, therefore, that Esteves did not possess the attributes of a supervisor under the Act. Any authority she exercised over employees in directing or assigning work had already been designated by Golub and did not require the use of independent judgment. I find, further, that by virtue of her skills, Esteves was a leadperson. Accordingly, I find that Esteves was not a supervisor within the meaning of the Act, and shall be included in the unit. Under the circumstances, I find that the unit consisted of 20 employees, and that the Union did not achieve majority status until June 26, the day the 11th employee signed a card.<sup>16</sup>

Golub creditably testified that the first time he learned of the Union's interest in the Company's employees was on June 5 when he was told by Seversky, a company vice president, that he had been approached that day by a union representative who told him that the Union represented a majority of the office clerical employees and requested recognition. Golub stated that he then contacted the Company's labor counsel and advised him of the Union's presence on the premises. Golub told his counsel that he had planned to give raises to several of his employees the very next day, June 6; that he had promised the employees in April to review the salary structure and adjust it; that the plan had been formulated on May 24; and that a written list existed since that date which contained the names of the employees and the amounts that they were to receive. Whereupon counsel advised Golub, "Well, if you were planning to give them, then you have got to give them. If you were not planning to give them, then you can't go ahead and do it now, but

<sup>9</sup> By June, this number had dwindled to 55.

<sup>10</sup> Two employees called to testify by the General Counsel, Jeanine Casale and Donna Mitchell, confirm Golub's account of the meeting.

<sup>11</sup> Golub kept referring inadvertently to that Saturday as May 23. Inasmuch as I find no particular significance attached to the exact date, I am correcting it accordingly to conform with the calendar.

<sup>12</sup> This employee, Marusy, was earning \$200 per week.

<sup>13</sup> They were primarily office clerical employees.

<sup>14</sup> It is Golub's uncontroverted testimony that if the showroom employee had not left, no increases would have been given.

<sup>15</sup> The employees signed in the following chronological order: On June 2—Jeanine Casale, Linda McLean, Raya Davidovich, Jean Hines (Thomas), Patricia Lloyd, and Donna Mitchell; on June 3—Sofya Davidovich and Michele Parsons; on June 4—Carmen Acevedo; on June 9—John McGlyn, Jr.; on June 26—Maxwell Kuetey; and on June 27—Mildred Scantlebury and Marsha Poe. A question arose at the hearing as to the admissibility of Sofya Davidovich's card. After close scrutiny of the Fed. Rule Evid. 901(b)(3), and the pertinent case law, I conclude that the card is admissible in evidence and is being counted, as shown above.

<sup>16</sup> The General Counsel added inaccurately when he contended, in his brief, that 11 employees had signed authorization cards for the Union by June 9. The correct figure is 10.

whatever you were planning to do, you have to continue to do and you are not allowed to change your plans because a union is suddenly present on the scene."<sup>17</sup> And so, on June 6, in the late afternoon, Golub called the employees into his office, one at a time, and told them the increases they were to receive, effective immediately.<sup>18</sup> Golub stated that his selection of these employees for increases was based on two criteria: The length of time since the individual's previous raise, and the imposition of additional duties on some of these employees. Golub contended that he chose June 6 as the day to announce the increases because he had decided on that day on May 24 when he formulated the plan, the sales force had advised him to expect a flood of orders from June market week and therefore there would be much work for the clerical employees, and with the showroom employee, Marusy, leaving on June 6, the money became available for distribution among other employees.

On June 11, the Union filed a representation petition with Region 2 of the Board seeking an election in a unit of office clerical employees employed by the Company, and on June 24 a conference was held at Region 2 to discuss the petition. In the interim, Esteves is alleged to have interrogated John McGlyn regarding union activity in the office. McGlyn, a computer operator, testified that Esteves asked him if he had heard anything about the employees trying to join a union, and when he replied negatively, she told him that if the employees went through with it, they could possibly lose their jobs or put the Company out of business. Esteves categorically denied having such a conversation with McGlyn.<sup>19</sup> In addition, testimony was elicited from Casale to the effect that on June 13 and 20, the Company gave parties to the employees at 4 o'clock in the office, and that at the first party, Golub brought some cake in.<sup>20</sup> That is the sum

total of the evidence regarding the two parties.<sup>21</sup> Also, as stated previously, about mid-June, Golub advised the employees of the impending move from 33d Street to 14th Street. The June 24 conference failed to result in a consent election agreement, and so a hearing was set to commence on June 30.<sup>22</sup>

Christine Kerber, the organizational director for Local 40, ILGWU, was called to testify by the General Counsel. She stated that in June an anonymous phone call was received in her office from a female who identified herself as an office clerical employee of the Company; that the female said that "the carpenters were organizing or trying to organize the office workers, but that since we had a contract with the production workers, they were interested to hear what kind of benefits that we had and could we send somebody down to speak to them." Whereupon Kerber assigned Jose Rivera and Pasquale Fonseca to organize the Company's clerical employees. Fonseca testified that he saw Rivera obtain signatures from employees on ILGWU authorization cards.<sup>23</sup> Donna Mitchell, an employee, testified that she saw a man fitting Rivera's description, in Golub's office on June 26.

On Friday, June 27, the Company told its factory employees that it was shutting the plant down for 2 weeks, effective immediately. Ninety percent of the factory employees were laid off and six office clerical employees were terminated. Golub testified that this occurred as a result of the poor June market week that the Company experienced. The active accounts of the Company fell from 3,000 to 700, and the closing down of the handbag operation removed most of the small retailers from the account ledger. Golub decided then to sell the second computer because he felt that with 700 accounts the use of a computer became unnecessary. Not having a computer, the need for computer operators or keypunch operators no longer existed and Golub determined that he would eliminate the department. This necessitated the discharge of the three keypunch operators: McGlyn, McLean, and Raya Davidovich. McGlyn testified that he had signed a card for the Union at a restaurant and given the card to the president of the Union; that he had not gotten an increase in wages on June 6; that Golub had called him into his office on June 27 and discharged him after telling him that he was getting rid of the computer and he had no place to put McGlyn. Neither McLean nor Davidovich was called to testify. Golub further testified as to the discharges of the three credit and collections clerks, Jeanine Casale, Michelle Parsons, and Donna Mitchell. He stated that he had contracted out the collection work to Dun and Broadstreet in June, and there was, therefore, no further need for these employees. Mitchell testified that she, Casale, and Parsons were called into Golub's office on June 27 and told that the

<sup>17</sup> The General Counsel, in its brief, attempts to show the implausibility of such an exchange, by citing *J. J. Newberry Co. v. N.L.R.B.*, 645 F.2d 148 (2d Cir. 1981), in which the employer was advised by the very same labor counsel as here, *not* to implement an unannounced but scheduled wage increase in the face of a petition. The General Counsel should note however that the Board decision in the *Newberry* case, which issued on June 2, 1980 (just 3 days before counsel gave its advice in the instant case), found that the Employer, by withholding the wage increase, had violated the Act. Under the circumstances, such an exchange between Golub and his counsel was entirely plausible. However, in any case, reliance upon the advice of counsel has never been viewed by the Board as a mitigating circumstance in assessing a violation under the Act. I merely credit Golub with having the conversation.

<sup>18</sup> The following are the employees who received wage increases:

Margaret Baptiste and Jeanine Casale, \$20 each; Sophia Davidovich, Carmen Acevedo, Pauline Kaplewicz, Alice Lasher, Pat Lloyd, Linda McLean, Donna Mitchell, Francis O'Hagen, Daisy Ringwater, and Jean Thomas, \$15 each.

<sup>19</sup> This allegation and the recital of the facts pertaining thereto, no doubt are predicated on the General Counsel's assumption that Esteves is a supervisor and that, therefore, such interrogation and threats are violative of Sec. 8(a)(1) of the Act. While I am inclined to disbelieve McGlyn's testimony and credit Esteves in light of the total picture which I shall discuss, *infra*, at this point, I shall dismiss the allegation merely on the grounds of my previous finding that Esteves is not a company supervisor, and therefore cannot bind the Company by the alleged incident.

<sup>20</sup> On cross-examination, Respondent's counsel asked Casale if she knew that June 13 was Golub's anniversary. To this, Casale replied that she did not attend the party.

<sup>21</sup> Inasmuch as the complaint does not allege these parties to be violative of the Act, I can only assume that the evidence was adduced to show a pattern of something. But, of what?

<sup>22</sup> It was at the June 24 conference that Golub learned for the first time that Jeanine Casale was the daughter of the president of the Union.

<sup>23</sup> Four such cards were introduced into evidence, three of which were dated June 26, and one June 27. None of the signers had previously signed cards for the Union.

Company was suffering from great financial strain, and that Golub saw the only way to keep it going would be in letting the employees go. Casale stated that Golub told them he was closing the computer system and he was trying to cut the real estate in half by moving down to 14th Street, and he fired the three employees.<sup>24</sup>

#### Analysis and Conclusions

The essential facts in this case are not in dispute. The overwhelming and uncontroverted evidence establishes, without a question of a doubt, that the Company was on the verge of financial disaster when Golub was hired in March 1980 to attempt to stem the tide of collapse. The record reflects, without contradiction, that the Company experienced a tremendous drop in sales, bookings, and the number of invoices from 1979 to 1980. Golub was faced with the monumental task of trying to turn the business around so that it could survive, and it was a task that could not be accomplished overnight. Golub's first several weeks on the job were devoted to assessing the situation. His first major personnel act was the discharge of the office manager on April 17. When this brought repercussions from the office clerical employees, Golub met with them, listened to their gripes, and promised, as soon as possible, to fulfill prior promises that had been made to the employees regarding wage increases. And, on May 24, having now had a sufficient opportunity to review personnel records and to personally oversee the work of the office clerical employees, and armed with the resignation of an employee to take place 2 weeks hence, he compiled a list of 12 employees, selected to get wage increases, among whom he would split the salary of the departing employee. All of the above occurred prior to any inkling on management's part that the Union was attempting to organize the employees. In fact, the evidence shows that the first authorization cards signed by any employee was dated June 2. Although Jeanine Casale testified that the Union began its campaign in April, I find, in light of the fact that Casale is the daughter of the Union's president and was instrumental in having the Union organize, and her card is dated June 2, that the campaign did not start until June 2. However, fortified with 9 cards, the Union made its demand on the Company on June 5, and on June 6, as planned, Golub announced the wage increases to the 12 employees.

The General Counsel and the Union's counsel argue that this grant of a wage increase was the Company's response to the Union's demand for recognition and, as such, constituted a violation of the Act. Respondent counters by saying that the granting of the increase was merely the implementation of a prior decision that was awaiting the proper time to occur. The General Counsel relies totally on the timing of the announcement of the increase. He offers not one shred of evidence to show union animus on the part of Respondent, nor company knowledge of who among the employees supported the Union and were they the same who received the wage increase. In fact, Golub creditably testified that he never saw any of the authorization cards nor did he know which of the employees had signed cards. All that the

General Counsel does is surmise and conjecture over the act of the Respondent. Yet, on cross-examination of the employees who testified and who were present at the April 17 meeting, these employees stated that Golub had promised to review the wage structure and to give increases accordingly. And further, the General Counsel offers no evidence to refute Golub's testimony that the decision to give the increases was arrived at on May 24 to be implemented when the money was available (2 weeks later). Rather, the General Counsel merely impugns the integrity of Golub by doubting that such was the case. It seems to me that the burden of proof lies with the General Counsel to verify and pinpoint the evidence necessary to sustain the allegation of a violation. The mere timing of the act alleged is insufficient. I am convinced that the action of the Company in granting the increases, coming at a time when the Company was attempting to "stay alive", was not an act to defeat the organizational effort of the Union, but was the fulfillment of a promise made previously to the employees whom this Company needed at that time. I am firmly of the belief that the action of the Company in implementing on the wage increase decision June 6, arrived at on May 24, would have taken place even in the absence of the Union's demand for recognition on June 5. I find therefore that the granting of the wage increase was not violative of the Act.

Subsequent to June 6, the Company's economic picture continued to look bleak, necessitating additional cut-backs. Plans for the consolidation of the Company's operation at 14th Street were proceeding apace, transfer of the collection function was passed on to Dunn and Broadstreet, and the sale of the second computer was planned for July. Under the circumstances, Golub now resorted to a reduction in staff. With the sale of the computer, he no longer needed keypunch operators, and with Dunn and Broadstreet handling collections, he no longer needed collection clerks. And so, he decided to do away with those two departments and discharge the employees therein. This occurred on June 27, at the same time that he laid off the factory employees for a 2-week period. The General Counsel contends that the discharges of the six office clerical employees was a direct result of the Union's organizational activities. Respondent claims that this was merely a continuation of an ongoing process to keep the Company functioning. The General Counsel again relies on the timing of the discharges which followed closely the June 24 meeting at Region 2 where Golub discovered for the first time the relationship of Casale to the president of the Union. The General Counsel, while acknowledging Respondent's severe financial condition, questions either Respondent's business acumen in discharging Casale, an employee who had previously been given a raise, or wonders whether it was not done because of her union activity, and applies similar reasoning to the other discharges. Yet, the Board has affirmed Administrative Law Judge John C. Miller who stated in *Daniel Construction Company, a Division of Daniel International Corporation*, 236 NLRB 193, 197 (1978), "While one may question whether the layoffs were premature in view of the 2 weeks of work remaining, this falls within

<sup>24</sup> Parsons confirmed the testimony of Mitchell and Casale.

the area of reasonable managerial judgment that I am not prepared to second guess, absent clear evidence of discriminatory motivation." That, too, applies to the instant case. No where in the entire record does the evidence reveal an antiunion motivation by Respondent. Except for the alleged Esteves-McGlyn incident, which I have disposed of, *supra* at fn. 19, to support the General Counsel's theory of discrimination, there is a total failure on the General Counsel's part to produce even a trace of evidence of any union animus. Rather, Respondent was knee-deep in financial problems, and resorted to various means to accomplish its purpose, none of which I find discriminatory. As the Board stated in *Wright Line, Inc., a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980):

First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Even assuming, and I have my doubts, that the General Counsel in the instant case, has made such a *prima facie* showing, I believe that the Company has more than amply demonstrated that its paramount concern was the financial welfare of the Company and that the discharges would have occurred in any event. To me, the evidence presented by the General Counsel was too dependent upon supposition and presumption to be probative. Therefore, I conclude and find that Respondent has not violated the Act by discharging employees Casale, Parsons, Mitchell, McGlyn, Davidovich, and McLean.

Based on the weight of the credible evidence, I find and conclude that by discharging the above-named employees, by granting wage increases, and by withholding recognition of the Union, Respondent did not engage in violations of Section 8(a)(1), (3), and (5) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The allegations of the complaint that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act have not been supported by the evidence.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>25</sup>

The complaint herein be, and the same hereby is, dismissed in its entirety.

<sup>25</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.